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Give the People What They Want: The Failure of "Responsive" Lawmaking

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COMMENTS

Give the People What They Want: The Failure of "Responsive" Lawmaking

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> Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.[1]
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> —Edmund Burke

Introduction

Congress is unpopular. This is hardly a controversial statement. Dissatisfaction with the national legislature emanates from a widespread belief that its Members do not listen to the voices of the people who sent them to Washington, D.C.[2] Indeed, only 33 percent of the American public believe that elected officials care what the public thinks.[3] This cynicism is rooted in the perception that Congress is out of touch with the American public. Implicit in this perception is the notion that constituents want a more responsive legislature. In spite of, and perhaps because of, this perception, there are signs that Congress is becoming increasingly "responsive."

This Comment argues that the legitimacy of the Congressional institution should not hinge on whether it responds to a critical mass of individual preferences registered daily in the form of phone calls, letters, and electronic mail—the features of what I will call phone call democracy. The polls that indicate Congress is distrusted because it fails to listen to constituent voices suggest that constituents link the legitimacy of the institution with the level of responsiveness it exhibits to individualized concerns. This Comment challenges that notion and argues that, rather than rehabilitating the legitimacy of a

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1. Edmund Burke, *Speech to the Electors of Bristol*, in 2 *The Works of the Right Honorable Edmund Burke* 89, 95 (Little, Brown 9th ed 1889).

2. Times Mirror Center for the People and the Press, *The People, The Press & Politics: The New Political Landscape* 22-23 (Times Mirror 1994).

3. Id at 23.

greatly distrusted institution, hyper-responsive politics will produce measures with unanticipated results. These results, in turn, will beget both a cycle of bad politics, in that they are unlikely to increase public confidence in Congress, and bad law, in that the measures are frequently ineffective and ill-considered.

The 1994 midterm elections illustrate the shift to a more "responsive" legislature. The midterm elections of 1994 resulted in the changing of the guard in both houses of Congress and in the Contract with America, the platform for Republican candidate success in 1994.[4] The Contract with America is itself an example of hyper-responsiveness to public clamor for action on a number of measures. In 1995, during the critical first 100 days of the Republican-controlled House of Representatives, the House held votes on nearly every piece of the Contract.[5] The message here is that Congress Members heard what voters wanted and were giving it to them.

The fact that legislators are trying to please their constituents is hardly newsworthy. Law-makers seem to view doing so through legislative results as an unabashed good thing.[6] This belief is so sweeping that representatives of both political stripes are quick to proclaim their loyalty to whichever side has received the most, and often the loudest, support.[7]

From health care to budgetary policy, legislators are faced with public support for policies that may exacerbate the problems they are supposed to fix. This produces a Catch-22 for Members. Some problems cannot be fixed simply by following the expressed wants of constituents. For example, constitu-

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4. Ed Gillespie and Bob Schellhas, eds, *Contract With America: The Bold Plan by Rep. Newt Gingrich, Rep. Richard Armey and the House Republicans to Change the Nation* (Times Books 1994). The Contract With America was introduced by Representatives Newt Gingrich, (R-GA), and Richard Armey, (R-TX), as a platform on which Republican candidates in 1994 could run and was the product of intense polling to generate its content. The Contract lists specific proposals and legislation intended by the House Republicans to be the first items on the agenda of a Republican-controlled Congress. See also Frank I. Luntz, *GOP Aims Its 'Contract' at Alienated Voters*, Wall St J A14 (Sept 27, 1994).

5. Richard Wolf, *100 Dizzying Days*, USA Today 1A (Apr 6, 1995). See also *Contract with America—Overview*, Hearings before the Committee on Ways and Means, 104th Cong, 1st Sess (Jan 5, 10-12, 1995).

6. Kevin Merida, *Polishing Congress's Tarnished Image: Lawmakers Struggle to Counter Public's Distrust of the Institution*, Wash Post A1 (Jan 25, 1994).

7. See especially remarks of Senator Bill Bradley, (D-NJ), regarding a newly energized citizenry: "I received—like many Senators—thousands of calls on Zoe Baird . . . just as I received thousands of calls and letters during the Anita Hill-Clarence Thomas hearings. It is too early to be sure, but we might be seeing examples of a newly engaged and energized citizenry. . . . [P]eople want to be heard in a new and compelling way. Washington commentators, stunned by the public participation, asked each other, 'Is it possible the people really count?' The answer is yes, the people count—for everything." 139 Cong Rec S 1516 (Feb 16, 1993). But Senator Bradley also flagged the dangers of this energized citizenry: "That does not mean in every case a Representative should allow his phone or mail log to determine his vote, but what it does mean is that an engaged citizenry over time can shape the direction of the country through their Representatives." Id.

ents who want more and better services but lower taxes or those who want a balanced budget but refuse to put entitlement spending on the table create a quandary for legislators. Increasingly, policy responses to the most vexing questions facing the country have been the product of a legislature that seems to have abandoned its deliberative function only to listen to the loudest voices.

This Comment discusses two aspects of the phenomenon of phone call democracy: first, that it distorts the Framers' conception of representative government; second, that it produces ill-conceived solutions. Section I of this Comment defines phone call democracy and describes a rise in contacts by individuals with Members of Congress. Section II places this trend in context by summarizing the debate surrounding the drafting of the Constitution over choosing a representative—rather than a directly democratic—legislature. Section III examines the relationship between the increase in direct democracy at the state level and the increased influence of phone call democracy at the national level. Section IV grounds these concepts by discussing the recently enacted Violent Crime Control and Law Enforcement Act of 1994 (the "Crime Bill"),[8] and examines how "phone call democracy" did not promote sound policy. Finally, Section V applies two models of representation put forth by current scholars to the Congressional institution and concludes that the structure and procedural rules of the Congressional institution itself offer the best defense against the hyper-responsive lawmaking inherent in phone call democracy.

I. Defining Phone Call Democracy

A look at the *Congressional Record* over the past few years, and at the debate surrounding policy issues resonating most with the American public, indicates a not-so-subtle response to public cynicism. In particular, the shift is toward a hyper-responsive lawmaking that I will call "phone call democracy," in which legislators tally phone calls, letters, and other contacts on a given proposal and vote accordingly. Phone call democracy is more akin to direct democracy than the representative system envisioned by the Framers and James Madison in particular. Direct democracy refers to the use of ballot initiatives and referenda to enact laws at the local and state level. This Comment argues that the national legislature is increasingly responsive to individual manifestations, such as phone calls, letters, e-mails, and faxes, of constituent preferences that mimic some of the features of direct democracy. Direct democracy, as it is exhibited in state ballot initiatives and referenda, provides a framework to look at the Congressional trend toward phone call democracy.

An examination of the *Congressional Record* reveals that references made by Senators during debate on major bills regarding phone call tallies to Members' offices has increased markedly. For example, there were more than

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8. Violent Crime Control and Law Enforcement Act of 1994, Pub L No 103-322, 108 Stat 1815, codified at 42 USC §§ 13701 et seq (1984).

250 such mentions in the Senate during the 103d Congress alone—a Congress which included the passage of the 1994 crime bill—compared with 100 such references during the 101st Congress.[9] The trend may indicate an increase in the frequency of contacts to Members. Perhaps more importantly, the increased mention of the individual calls, even if only rhetorical, indicates the acceptance and influence of phone call democracy.

Phone call democracy describes an aspect of the legislative process distinct from interest group politics. In phone call democracy, the focus is not on whether voices are ignored in the lawmaking process or whether some laws are the product of powerful and wealthy groups. Rather, phone call democracy focuses on the influence that individuals as individuals have on the process. For phone call democracy, the question becomes should such influence be a justification for policy choices? Should adherence to popular will manifested in phone calls and contacts by constituents be a justification for policymaking and the larger project of restoring faith in the lawmaking process?

II. The Framers' Debate: Responsiveness or Representation?

The question of whether Members should exercise their duty of representation by responding to constituent interests alone or by incorporating their own deliberation into the legislative process is not a new one. The beginning of the republic was marked by a lengthy debate on whether the people are the "best keepers of their own liberties" or "no keepers at all."[10] At the root of this debate was the Framers' conviction that the people are the most legitimate source of government but may be ill-suited as guardians of that responsibility.[11] That the people would have a right to a voice in the new government was not in dispute. However, the debate over the form that right would take illuminates the Framers' understanding of the best system of representation.[12]

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9. These numbers were generated from an online search of the Congressional Record database of references made by Members to direct contact from constituents by phone call, fax, letter, or electronic mail.

10. John Adams, *Defence of the Constitutions of Government of the United States*, in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 59, 59 (Chicago 1987).

11. Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 40 (Chicago 1987).

12. Historians of the debates surrounding the formation and adoption of the Constitution have detailed the beliefs of many of the Framers as to the merits of a representative or a direct democracy. See generally, id at 382-420; Ralph Ketcham, *James Madison: A Biography* 180-183 (MacMillan 1971); Charles Bangs Bickford and Kenneth R. Bowling, *Birth of the Nation: The First Federal Congress, 1789-1791* 5-6 (George Washington Univ 1989).

Although many of the key participants agreed that listening to the voice of the people was essential to a free nation, they did not necessarily favor direct governance by the people. "All could agree with Thomas Gordon's *Cato* that the distinguishing feature of a free nation lay principally in its magistrates having to 'consult the Voice and Interest of the People.' But while it was incontestable that 'every Man ought to know what it

James Madison is perhaps most strongly identified with the notion that representative government ensures a more deliberative democracy.[13] He believed that a country as large as the United States could only be governed through representation.[14] Moreover, the size of the United States would itself be a guard against the corruption of public officials by both popular passions and their own immediate interests in using their popularity to dominate the people.[15] Madison worried about the dangers inherent in a direct democracy[16] and advocated a republican form of government in which citizens at large elect delegates to deliberate on issues concerning the polity.[17] Finally, Madison feared the instability of successive majorities.[18]

Madison was not alone. Alexander Hamilton also voiced his concern with placing too much power in the hands of the people. "The republican principle . . . does not require an unqualified complaisance to every sudden breese [sic] of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests."[19] And John Adams feared that the people could "neither act, judge, think, or will, as a body politic or corporation" and believed it necessary to "temper their authority in legislation with the maturer counsels of the one and the few."[20]

Others, however, held a contrary view. The correspondence between Madison and Jefferson at the time of the Constitutional debates reveals distinct differences in theories of popular governance. Jefferson was in favor of popular control and favored constitutional conventions on many more questions than Madison thought practical or preferable. Jefferson felt that it was an error to bind later generations to the constitution that was then being formed. He believed that each successive majority should bind only itself.[21]

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concerns All to Know,' that did not necessarily imply direct governance by the people." Kurland and Lerner, eds, 1 *The Founders' Constitution* at 41 (cited in note 11) (quoting Thomas Gordon, *Cato's Letters, No 38*).

13. "A pure Democracy . . . can admit of no cure for the mischiefs of faction. . . . A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking." Federalist 10 (Madison) in Garry Wills, ed, *The Federalist Papers* 42, 46 (Bantam 1982).

14. Id at 46.

15. Id.

16. Id.

17. Id.

18. See *Letter from James Madison to Thomas Jefferson, Feb 4, 1790*, in Charles F. Hobson and Robert A. Rutland, eds, 13 *The Papers of James Madison* 18-21 (Virginia 1981).

19. Federalist 71 (Hamilton) in Garry Wills, ed, *The Federalist Papers*, 362, 363 (Bantam 1982)

20. Adams, *Defence of the Constitutions of Governments of the United States* at 59 (cited in note 10).

21. See *Letter from Thomas Jefferson to James Madison, Sept 6, 1789*, in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392-397 (Princeton 1958). On the other hand, Madison feared instability of successive majorities. See *Madison to Jefferson, Feb 4,*

The debates over bicameralism, and over the right of the people to instruct their representatives to enact certain measures, suggest that the framers rejected direct democracy as a method of national governance in favor of republicanism.[22] First, the decision to have two Houses of Congress reflects the Framers' views of the limits of popular will and consent in government. The lower chamber was seen as closer to the people and more reflective of popular consent in the process. The Framers realized, however, that "[a] single branch of Legislation is a many headed Monster which without any check must soon defeat the very purposes for which it was created, and its Members become a Tyranny dreadful in proportion to the numbers which compose it."[23] Accordingly, the Senate was seen as a check on the House.[24] And note that at the founding, the state legislatures—not the people—elected Senators, and it was not until 1913 that the Seventeenth Amendment provided for the direct election of senators.[25]

Second, the Framers' debate over whether the people should have a right to instruct their representatives clearly exhibits a preference for a representative rather than responsive form of government. The right to instruct representatives through the use of town meetings or recalling representatives—which Noah Webster called a "right of doing infinite mischief, with the best intentions"[26]—could be viewed as a way to ensure that representation was fair and safe from corruption of the elected few.[27] In the first Congress, the Framers

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1790 at 18-21 (cited in note 18).

22. James Madison, *Wednesday, June 6th, In the Committee of the Whole*, in Max Farrand, ed, *The Records of the Federal Convention of 1787* 132, 134 (Yale 1937).

23. William Hooper, *William Hooper to the Congress of the State of North Carolina*, in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 361, 361 (Chicago 1987).

24. See James Wilson, *Of Government*, in Robert Green McCloskey, ed, 1 *The Works of James Wilson* 284, 290-92 (Belknap 1967).

25. US Const, Amend XVII.

26. Kurland and Lerner, eds, *The Founders' Constitution* at 386 (cited in note 11) (citing Noah Webster, *Of Government*, 1788).

27. John Adams saw instruction as a way to check government power and make sure it stayed true to popular will. See John Adams, *The Earl of Clarendon to William Pym, January 27, 1776*, in Robert J. Taylor, ed, 1 *Papers of John Adams* 168 (Belknap 1977). Burke, on the other hand, felt that the opinions of the people would have influence on a representative but not surmount "his unbiased opinion, his mature judgment, his enlightened conscience." See Burke, *Speech to the Electors* at 446-448 (cited in note 1). George Washington felt that instructions could work at the local level but were unworkable at the federal level and would ultimately defeat deliberative efforts by Congress. "That representatives ought to be the mouth of their Constituents, I do not deny, nor do I mean to call in question the right of the latter to instruct them. It is to the embarrassment, into which they may be thrown by these instructions in *national matters* that my objections lie. . . . Now a County, a District, or even a State might decide on a measure which, tho' apparently for the benefit of it in its unconnected State, may be repugnant to the interests of the nation, and eventually to the state itself as a part of the confederation." *Letter from George Washington to Bushrod Washington, November 15, 1786*, in John C. Fitzpatrick, ed, 29 *The Writings of George Washington from the Original*

rejected an amendment giving people the right to instruct Members in this way, claiming it inconsistent with the deliberative role of the body.[28] While many of the objections to a right to instruct in the citizenry were rooted in concerns about practical limitations of doing so on a national scale,[29] the decision to have a bicameral structure and the discussion over who should be representatives indicate that practicalities were not the only concern. The formation of a representative government is unlikely to have been a default decision deriving from the practical difficulties of direct democracy. Rather, the Framers believed that a system of representation was necessary to guard against popular passions.[30]

Ultimately, Madison's vision of a legislature of delegated representatives "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country,"[31] reflected the consensus of the Framers as well as the practical reality that the republic encompassed an expanding territory with long distances and large groups to be represented. But as this Comment will argue, legislative responses to public fear of violent crime demonstrate a trend away from this idea, in favor of giving individuals a direct participatory role in law making.

This role, however, is in tension with James Madison's view that "the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose."[32] Madison doubted the ability of the "enlightened statesman . . . [to] adjust to these clashing interests, and render them all subservient to the public good."[33] Madison foresaw that "[e]nlightened statesmen will not always be at the helm."[34] While Madison's notion of representation appeared to win the day at the Constitutional Convention of 1789, centu-

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Manuscript Sources, 1745-1799 67, 67 (GPO 1939).

28. See Joseph Gales, ed, 1 *Annals of Congress* 761-776 (Gales and Seaton 1834). The Constitution adopted in 1789 did not contain a provision, which had been included in the Articles of Confederation, that allowed "each State, to recal[l] its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year." *The Articles of Confederation and Perpetual Union, Art 5*, reprinted in Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* 263, 264 (Wisconsin 1940). See also the discussion of this debate in the first Congress in David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U Chi L Sch Roundtable 161, 172-73 (1995).

29. See Kurland and Lerner, eds, *The Founders' Constitution* at 97-98 (discussing how the criticisms of representation and republicanism were rooted in Montesquieu's notion that republics could only do well in small areas) (cited in note 11).

30. Federalist 10 (Madison) in Garry Wills, ed, *The Federalist Papers* at 46 (cited in note 13).

31. Id at 46-47.

32. Id at 46.

33. Id at 45.

34. Id.

ries later the debate continues. The modern Congress is driven by the notion that the legislature should be directly responsive to constituent preferences. The question remains whether our leaders should serve the popular will or serve the public interest, and whether one precludes the other.

III. The Move Toward Phone Call Democracy

Given the evidence that the Framers clearly preferred representative over direct democracy, the growing trend toward modes of direct democracy such as state ballot initiatives and phone call democracy may be cause for concern. A closer examination of legislators' motives and the voters' desires for more responsive government will help identify the driving force behind these phenomena.

A. Legislative Responsiveness and the Individual Voter

One explanation of the phenomenon of phone call democracy is that it is entirely legislator driven. In light of increased awareness of public dissatisfaction with the Congressional institution, Members may feel that citizens leave the blame entirely at their feet because of a presumption that Members are controlled by special interests. In reaction to this perception, Members may attempt to assauge this perception by conveying that they listen only to individual views. This idea is of course predicated on the notion that phone call democracy is not a manifestation of interest group activity.[35]

Social choice theory and students of interest group politics critique the legislative process with an assumption that responsiveness to group pressures drives the process.[36] The justification for phone call democracy, by contrast, functions on the assumption that the legislator is fulfilling his mission by responding to individuals. Thus phone call democracy focuses on the influence of individuals rather than on the influence of identified or organized groups. Instead of explaining legislative decisions as an outgrowth of behind-the-scenes influence and logrolling, phone call democracy rewards the influence of individuals. Members can state without fear of reprisal or criticism that their vote is based on contacts from individuals precisely because they are individuals. Only real grassroots sentiment is deemed legitimate; the minute contacts take the form of group organization, their influence becomes suspect and impermissible.[37]

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35. As will be discussed below (see text accompanying notes 66-68), some of the critics of direct democracy argue that phone call democracy is actually the product of interest group drives to mobilize supporters to solicit their representatives and not the product of individualized preferences.

36. See generally Dennis C. Mueller, *Public Choice II* (Cambridge rev ed 1979); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q J Econ 371 (1983); Robert A. Dahl, *A Preface to Democratic Theory* (Chicago 1956).

37. See, for example, the comments of a Member explaining contacts by individual constituents, "[W]e have had phone calls pouring into our office. As far as I can tell there is no organized effort to cause this to happen." 140 Cong Rec H 8456 (Aug 16, 1994)

The key to permissible contacts is that they must not be orchestrated by or traceable back to an organized interest group. Phone call democracy can be seen as a reaction or response to interest group politics. Given cyncism regarding interest group influence, it is unsurprising that phone call democracy privileges contacts from individual voters and views these as inherently more legitimate than group influence. The force of these individual voices is that they originate outside both the government and interest groups.

An examination of the Congressional Record suggests that Members welcome the opportunity to state that their vote is not only influenced but in fact dictated by phone calls and letters received from individuals. The Crime Bill debate in the 103d Congress, for instance, was replete with references to phone calls and individual contacts. While Republicans derided the bill's spending provisions and noted their constituents' opposition to an expensive crime-fighting bill, Democrats reported that they were receiving onslaughts of constituent support for the bill. More specifically, Senator Jay Rockefeller, (D-WV), based his praise for the bill on support in his state for aiding law enforcement: "I know that every single Senator has gotten these letters and phone calls from the people of their States who are on the front lines. We are hearing and reading the fears and the needs of law enforcement officials all over America . . . those are the voices that we should respond to."[38] The remarks of Senator Sam Nunn, (D-GA), also indicate a desire to appear responsive to constituent calls: "We are, again, confronted with calls for effective and immediate solutions to a crime problem that has gone far beyond anything that most Americans would have imagined just 20 years ago."[39] Finally, the remarks of Senator Frank Lautenberg, (D-NJ), reveal what may have been most on the minds of Members as they made their speeches—constituent repercussions from a failure to act.

> We are continually talking about crime and the fear that permeates our society and the phone calls that come and the letters that come and the pleas that we have from people who feel helpless out there because they are afraid. But we respond in here because we are afraid if we do not pay attention to those voters there is going to be something to pay out there.[40]

Of course it is important for Members to have information in the form of letters, phone calls, and electronic mail communication from constituents. These are important and efficient means of providing information to decisionmakers. The problem comes when registering these communications becomes a proxy for instructing Members and cutting off the Members' deliberative functions.

(statement of Representative John T. Doolittle).

38. 140 Cong Rec S 12439 (Aug 24, 1994) (statement of Senator John D. Rockefeller IV).

39. 140 Cong Rec S 12458 (Aug 24, 1994) (statement of Senator Sam Nunn).

40. 140 Cong Rec S 472 (Feb 1, 1994) (statement of Senator Frank R. Lautenberg).

Scholars who have examined the legislative process by looking at the role of organized interests focus on dealmaking and group formation.[41] Through interest group politics, conflicting desires of groups are resolved through dealmaking. But there is a danger that the costs of formation and organization will preclude some groups from forming. As a result, the system benefits only those with the resources necessary to organize.[42] Essential to the focus on interest group politics is a concern regarding the influence of private wealth in the process, and the pressure it can bring to bear on lawmaking and who gets elected. At the heart of public distrust of the institution is the notion that money too greatly influences Members' policy choices.[43] The assumption here is that interest groups that affect Members do not already share voters' views and influence Members who represent isolated, elite views that are not shared by the "true" constituents. Of course, if the converse is true and interest groups share voters views then interest groups are merely the conduit for communicating these views to Members.

In light of these concerns, scholars interested in the Framers' experiment in a republican form of democracy evaluate the effectiveness of legislative process by gauging legislative outcomes according to whether voices have been excluded from the policymaking process.[44] Fueling this project is the idea that direct rule by the people is the chief goal of democracy and that individuals should therefore have the right to instruct the people they send to Washington. According to social choice theory, the absence of such instruction signifies a problem with the process and, by extension, with its product. Few scholars have questioned the idea that a more responsive legislature is also a more responsible one. But, as discussed below, representative democracy poses a problem for those who would have the legislator be directly responsive to constituent preferences.

B. STATE VOTERS—A CHANGE IN TACTICS

The increased responsiveness of the national legislature echoes a move toward more direct democracy that has occurred at the state level.[45] The number and frequency of the initiatives brought about in the states through either

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41. See, for example, Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* 289-317 (Harper & Row 1986).

42. The more general proposition that interest groups disproportionately reflect the concerns of the wealthy is well documented. See, for example, E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* 34-35 (Holt Rinehart 1960).

43. For information on campaign financing, see Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1994* 1496-1500 (National J 1993).

44. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 NYU L Rev 477, 494 (1994) (refering to this collective body of work as the "literature of exclusion").

45. David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U Colo L Rev 13, 26-27 (1995) (detailing the historical rise in use of initiatives and referenda on the state level).

ballot initiatives or voter referenda has increased in recent years and was at a record high in the 1996 elections.[46] Voters may perceive direct democracy as offering democratic benefits that a representative legislature does not.

The case study that follows in Section IV presents an example of a Federal statute enacted at least in part in response to the success and popularity of similar state initiatives. In essence, many of the state initiatives are the precursors to national offspring.[47] Experimenting with ideas in the states is a familiar practice. In fact, judges and scholars have argued that this is precisely how the Framers envisioned the Federal-State partnership—with states acting as "laboratories" for the nation.[48] But where phone calls and other spontaneous constituent reactions foreclose sound diliberation, the experiments of the states should be rejected.

The benefits of direct democracy include increased access to the political system and greater voter involvement in the legislative process.[49] To its proponents, direct democracy in the states expands the role of citizens in democracy,[50] and is the ultimate expression of civic virtue through heightened participation in democratic process.[51]

What is gained by the growing popularity of ballot initiatives and referenda? First, direct democracy allows voters to set the agenda by putting measures on the ballot through a process of signature gathering and petitions.[52] In addition,

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46. B. Drummond Ayres, Jr., *Voters Facing A Record Year For Initiatives*, NY Times A1 (Oct 24, 1996).

47. For instance, in New Jersey, "Megan's law" mandates notification to residents of a neighborhood into which a convicted child molestation offender is released. Registration and Community Notification Laws, NJSA 2C: 7-1-11 (1994). The New Jersey Supreme Court upheld the statute in *Doe v Poritz*, 142 NJ 1, 662 A2d 367 (1995). In Washington, a Sexual Predator statute was passed allowing for the continued incarceration of those deemed "sexual predators" based on a prosecutorial or court determination of defendant's predisposition to commit further crimes. Community Protection Act of 1990, Sexually Violent Predators, Wash Rev Code Ann §71.09 (West 1992). This law was found unconstitutional by a federal district court in *Young v Weston*, 898 F Supp 744 (W D Wash 1995). Both the New Jersey law and the Washington sexual predator law prompted discussion of federal sentencing responses to violent crimes. See generally Congressional debate regarding the proposed "Three-Strikes" measure, 139 Cong Rec S 1528-63, 15269 (Nov 8, 1993).

48. Justice Brandeis was the first to use this image, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co v Liebmann*, 285 US 262, 311 (1931) (Brandeis dissenting). While Justice Brandeis may have been the first to refer to states as "laboratories," the concept of the governmental experiment is considerably older, "The science of government . . . is the science of experiment." *Anderson v Dunn*, 19 US (6 Wheat) 204, 226 (1821).

49. Magleby, 66 U Colo L Rev at 13 (cited in note 45).

50. Id at 43.

51. Frank I. Michelman, *Foreward: Traces of Self Government*, 100 Harv L Rev 4, 19 (1986).

52. Magleby, 66 U Colo L Rev at 13 (cited in note 45).

voters can veto through the referendum process action taken by the legislature.[53] The popularity of these efforts can be explained, in part, by voter distrust of politicians and the process,[54] and by a desire to introduce new voices into the process.[55] In this way, the increase in direct democracy at the state level is founded on the same mood—and shares the same goals—as that which has prompted phone call democracy. They arise from the same distrust of the process.

At first glance, importing direct democracy to the national legislative process through phone call democracy resolves the problem of a Member's dislocation from her constituents. By repeated and frequent contact with a representative in Congress, constituents are more apt to feel that their representative is at least aware of the problems that affect them. This feeling is confirmed when a Member votes consistent with the view expressed by a constituent based on contact with the Member or his office. Of course, this can only be the case if that vote is well publicized and the motivation for it is directly linked back to the constituent expression of his or her individual preference.

But direct participation in the legislative process at the national level exacerbates the flaws in both the state and national processes.[56] Some critics of direct democracy have noted that it does not fulfill the promises it makes.[57] They note that ballot access requirements actually favor the well organized and well funded.[58] This point is reinforced by the existence of companies that collect petition signatures for initiative sponsors.[59] In addition, critics of direct democracy contend that it actually enhances the status quo, as voter caution tends to endorse measures that defeat change.[60] For instance, some initiative sponsors focus their efforts at defeating ballot measures rather than enacting separate laws. This strategy is similar to the success by interest groups in the national legislature at blocking particular pieces of legislation rather than passing new measures. This method takes advantage of the relative ease of stopping unwanted actions.[61] Critics charge correctly that voting on ballot initiatives and referenda

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53. Id.

54. See text accompanying notes 41-43 for references to interest group politics and influence of private wealth on the legislative process.

55. Magleby, 66 U Colo L Rev at 24 (cited in note 45) (discussing the rise of an "initiative industry" out of voter frustration with the government).

56. Jane S. Schacter, *The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy*, 105 Yale L J 107, 111 (1995) (exploring interpretive questions raised by the legislative products of direct democracy and representative legislatures.); Magleby, 66 U Colo L Rev at 43-45 (cited in note 45) (discussing, in particular, the problems inherent in the "popular intent" approach to both legislative outcomes and direct democracy).

57. Magleby, 66 U Colo L Rev at 45 (cited in note 45).

58. Id at 23, 36.

59. Ayres, NY Times at A11 (cited in note 46).

60. David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 167 (Johns Hopkins 1984); see also Richard Briffault, *Distrust of Democracy*, 63 Tex L Rev 1347 (1985) (reviewing David B. Magleby, *Direct Legislation*).

61. Schlozman and Tierney, *Organized Interests and American Democracy* at 317, 395-96 (cited in note 41).

suffers from the same bias in class participation and exclusion from the process as the national legislative process.[62] On both the state and federal level, direct democracy can provide a forum for vocal minorities, without actually representing a cross-section of the voters.[63] The initiatives on the ballots in the 1996 elections provide examples of well funded, and well organized interests. For instance, in California some of the most publicized initiatives indicate well organized minority interests at work and not necessarily a cross-section of the concerns of California citizens. The supporters of legalizing marijuana for medical use, opponents of affirmative action in public employment, and the supporters of a measure to ease the filing of shareholder lawsuits against corporate mismanagement may represent the success of minority views being placed on the ballot and in many cases well-funded ones.[64] Indeed, direct democracy favors the well-organized in that it is becoming a fertile field for professional organizers and initiative strategists.[65] In this way, it looks very much like interest group politics. In view of these criticisms, direct democracy's proponents overstate its promise of creating a better informed and more invested electorate.

C. PHONE CALL DEMOCRACY: DIRECT DEMOCRACY ON A NATIONAL SCALE

Despite the promises that direct democracy makes, constituents are worse off with features of direct democracy imported into the national legislative process. The blurring of direct democracy features into the representative legislative process prompts change that does not benefit constituents, and it encourages the adoption of legislation that is the product of a less deliberative process than that envisioned by the Framers.

Phone call democracy can be seen as a means by which constituents register their preferences and seek to instruct their representatives in much the same way that they do in the local and state ballot initiatives and referenda. However, it is not clear that phone call democracy accurately reveals individual preferences on the federal level. Phone call democracy remedies none of the defects of direct democracy. It does not improve access to the political system, and contacts that look like they are the product of spontaneous citizen reaction are often the product of organized efforts.[66] In fact, whether phone and letter campaigns usually are the product of spontaneous citizen interest or whether they are artificially generated has been called into question.[67] Legislation has been introduced that deals with the problem of artificial grass roots campaigns (aptly dubbed

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62. Magleby, *Direct Legislation* at 80 (cited in note 60).

63. Magleby, 66 U Colo L Rev at 35 (cited in note 45).

64. Ayres, NY Times at A11 (cited in note 46). The article details spending on different initiatives—$35 million spent to fight the stockholder suits initiative and $5 million spent by supporters of Proposition 209 on affirmative action.

65. Magleby, 66 U Colo L Rev at 24 (cited in note 45).

66. See Jube Shiver, Jr., *Reform Bill Prompts Frenzy of Lobbying*, LA Times D2 (Dec 14, 1995).

67. Id.

"Astroturf Support") and the problems these movements create when they overwhelm legislators with calls and letters. Representative John Dingell, (D-MI), introduced a bill making it a crime to misappropriate a person's name to influence legislation before Congress.[68] This bill was prompted by an intense lobbying effort in the form of telegrams, calls, and letters accompanying the consideration of telecommunications legislation.[69]

Phone call democracy blurs two essential elements of the legislative process that are distinct in deliberative democracy: the agenda-setting function and the decision-making function of each individual Member. Voters are apt to usurp the agenda-setting function of Members by registering their preferences with Members and by doing so such that the aggregate contacts influence the decision-making function of Members.

The power to set the congressional agenda should reside in the Members. The agenda-setting power is an essential element of the representative system that reduces the influence of quickly formed and inflamed factions.[70] Both the House and Senate function pursuant to a party caucus system which organizes the Members of the party around a legislative and political agenda, and a seniority system which disburses power in the party according to length of service in the representative body.[71] When the distinction between these two functions is blurred, as it is in phone call democracy, the process loses the constraint the Framers envisioned and makes its procedures superfluous.[72]

Direct democracy in the legislative process also weakens the essential structural safeguards of the committee system, as well as the obligation to investigate and deliberate. If constituents have a veto power, there is no point in having a committee, nor in being a credible member of that body. In effect, the constituent callers act as super-legislatures and direct democracy is writ large into the national representative system.

Phone call democracy in the legislative process could prove a formidable weapon for obstructionists. If the overwhelming source of dissatisfaction with Congress is the perception that it does nothing, a system that benefits obstructionists will not add to constituent confidence. As the Congress, particularly the Senate, is governed by rules which make it easier to block legislation than to enact it,[73] opponents of a particular measure might easily arm themselves with

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68. HR 2694, 104th Cong, 1st Sess, Nov 30, 1995 in 141 Cong Rec H 13869 (Dec 1, 1995) (a bill to provide that it shall be a federal crime to misappropriate a person's name in connection with lobbying).

69. See Shiver, LA Times at D2 (cited in note 66).

70. Madison defines faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Federalist 10 (Madison) at 43 (cited in note 13).

71. See, for expample, *Standing Rules of the US Senate*, Rule XXVI, §3(b) (GPO 1977) (regarding referral of legislation to committee by the Majority and Minority leaders).

72. See Section II setting out the Framers debate over representative versus direct democracy. The Madisonian conception of representation as a filter is superfluous if citizens can enact their will through direct democracy.

73. See, for example, "[W]hen a bill or resolution shall have been ordered to be read

a phone call tally that can be used to justify votes against cloture.[74] This tactic was employed in the debate on the Crime Bill in 1994 in efforts to strike from the bill a provision responsible for funding it—the Crime Prevention Trust Fund.[75] This provision violated the constitutional requirement that funding must be done through an appropriations bill thereby raising a budgetary point of order against the bill.[76] This point of order operates in the same way as cloture, and must be waived by a super-majority vote of 60 votes. Failure to waive the point of order results in the failure of the bill, and is accordingly a powerful weapon in the hands of a bill's detractors.

Critics of direct democracy worry about the ability of voters participating in direct democracy initiatives to make informed choices. When the legislative process adopts features of direct democracy such as the registering of voter preferences and the agenda-setting power of Congress, the same concerns arise. Where the constituent becomes a *de facto* legislator, phone call democracy is direct democracy writ large. To truly understand this process and the problems inherent in phone call democracy, an examination of a specific piece of legislation is necessary.

IV. The 1994 Crime Bill and the Three-Strikes-and-You're-Out Provision: A Study of Phone Call Democracy

A. CRIME POLITICS

The Violent Crime Control and Law Enforcement Act of 1994[77] (the "Crime Bill") was enacted in response to the nation's fears about violent crime. The "three-strikes-and-you're-out" provision contained in this legislation provides an example of phone call democracy resulting in legislation that becomes

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a third time, it shall not be in order to propose amendments, unless by unanimous consent." *Standing Rules of the US Senate*, Rule XV, §1 (GPO 1977). The rules providing for continuous debate on any matter unless unanimous consent is reached to proceed to a vote is the source of the increasingly popular filibuster in the Senate. The filibuster was used in the 102d Congress more often than in the entire nineteenth century. See Elliot L. Richardson, *For Democracy's Sake, Curb the Filibuster*, Newsday A31 (Oct 11, 1994); Robert Shogan, *Once Used Sparingly, Filibuster Becomes Common Obstacle*, LA Times A5 (Aug 31, 1994).

74. Cloture is the procedure by which a chamber ends debate on a matter. Sixty votes are needed to achieve cloture in the Senate and thereby cut off debate. Thus, only 40 votes are needed to obstruct a bill by prolonging debate in the Senate indefinitely. *Standing Rules of the U.S. Senate*, Rule XXII, §2 (GPO 1977).

75. Violent Crime Reduction Trust Fund, Pub L No 103-322, 108 Stat 2102 (1994), codified at 42 USC §14211 (1994). This provision created a trust fund in the Treasury Department to fund the programs created in the Crime Bill with the proceeds from the reduction in the Federal work force accomplished through the Federal Workforce Restructuring Act of 1994, Pub L No 103-226, 108 Stat 115 (1994), codified at 5 USC §3101 (1994).

76. "No money shall be drawn from the Treasury, but in consequence of appropriations made by Law . . . ." US Const, Art I, §9, cl 7.

77. 42 USC §§ 13701 et seq (1994).

identified with specific incidents—in this case a few higly publicized violent crimes.[78] This type of policy response might be called anecdotal legislation because it becomes immediately and continually identified with a specific incident. This legislation is the point of departure for a discussion of possible unanticipated, and often undesirable, consequences of the legislative process taking on the features of direct democracy.

Public opinion polls in 1992 and 1993 revealed that violent crime was, above all other issues, the number one issue on the minds of Americans.[79] Since then similar polls have revealed cynicism about Congress and its perceived alloofness from constituents.[80] Curiously, heightened public fear of violent crime has coincided with a decline in the actual numbers of many crimes in several major cities.[81] In fact, the crime numbers are squarely at odds with the crime hysteria.[82] Crime therefore exemplifies how an issue can result in the following cycle: public outcry, legislative response, followed by media blitz about how the public has been duped by a non-issue, and finally further public outcry. Naturally, this type of cycle feeds cynicism about Congress and its ability to offer practical solutions to real problems.

Crime has historically been an issue which both political parties have used as a symbolic way to define issues in campaigns and differences between candidates. It has been used as a proxy for race concerns and biases in election years.[83] The 1980s saw the repeated introduction of omnibus crime legislation packages that responded to public fears of random violence. In the last decade there has not been a major election year without a debate in the Congress as to which party is

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78. See text accompanying note 92-95.

79. John Hanchette, *Poll: Crime Surpassing Economy as a Top Issue*, Gannett News Service (Nov 12, 1993).

80. Ronald Brownstein, *Discontent Threatens Both Parties as U.S. '96 Vote Nears*, LA Times A1 (Nov 5, 1995) (only 12% of the electorate say they have confidence in Congress).

81. AP Newswire, *Large Drop in Killings Is Reported*, NY Times A12 (Dec 18, 1995). The number of homicides reported to the police decreased by 12% in the first half of 1995, and reports of violent crime decreased by 5%. In Chicago alone the number of killings fell by 19% from 478 to 388; in Houston they decreased by 31%, from 199 to 138; and in the District of Columbia, which has long shouldered the mantle of the "murder capitol," killings decreased by 22% from 193 to 151.

82. Richard Morin, *Crime Time: The Fear, The Facts; How Sensationalism Got Ahead of the Stats*, Wash Post C1 (Jan 30, 1994). See also Alfred Blumstein, *Youth Violence, Gangs and the Illicit Drug Industry* (1994) (unpublished manuscript on file with *The University of Chicago Law School Roundtable*). Blumstein analyzes the recent FBI data noting a flattening out of crimes and a period of stability since the 1980s. He points out that robberies occurred at a rate of 200-250 per 100,000 population and murders at a rate of 8-10 per 100,000 population, these numbers show "no statistically significant" rise since their peak in the early 1980s.

83. In the 1988 Presidential campaign, ads portraying Michael Dukakis, the Democratic nominee, as soft on criminals such as Willie Horton contributed to his defeat. See R.W. Apple, Jr., *The 1988 Election: The G.O.P. Advantage*, NY Times A1 (Nov 9, 1988); Andrew H. Malcolm, *Prison at a Crossroads: To Punish or Counsel?* NY Times A12 (Dec 26, 1988).

"tougher on crime."[84] The fact that neither party has resisted the temptation to use the issue of crime in this way detracts from the idea that 1994 crime legislation was purely the product of constituent pressures and phone call democracy. However, the crime issue's pedigree as a wedge campaign issue also makes it an appropriate issue on which to appear responsive. Crime, unlike other issues, has seen the emergence of popular sub-issues. We now have federal laws to respond to events heretofore seen as local concerns, such as drive-by shootings,[85] gangs,[86] and carjacking.[87] The habit of responding directly to those elements of the crime problem that people most fear—randomness and the perception that violent criminals are slipping through the cracks in a deluged system—culminated with the passage of the Crime Bill in 1994.[88]

After much wrangling, including rare meetings by two successive conference committees, the Congress passed, and the President signed, a bill that included dozens of federal death penalties,[89] along with the much touted "three-strikes

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84. The Crime Bill passed in 1994 contains many measures which have been fixtures of the Congressional crime debates for years. For a chronology of congressional action on crime legislation, see *Congressional Quarterly Almanac* Vol XLIX, 297 (Congressional Quarterly 1994). Omnibus crime bills have been the focus of Congressional debates in election years since the 1980s. Some of the key debates have centered around HR 4442 during the 100th Congress, S 1970 in the 101st Congress, and HR 3371 in the 102d Congress. HR 3371 was in many respects the genesis for many of the crime provisions ultimately passed in 1994. Final action was never completed on comprehensive crime legislation in the 102d Congress because of a Republican filibuster in the Senate which twice prevented finalizing debate on the measure and reaching a vote. Twice motions to invoke cloture were defeated in March of 1992 and again on Oct 2, 1992. For a discussion of the contentious debates over HR 3371, see *Congressional Quarterly Almanac*, Vol XLVIII, 311-13 (Congressional Quarterly 1993).

In the 103d Congress, with Democratic calls from the White House to respond to crime fears nationwide, similar bills were introduced in both the House (HR 3131) by Chairman Jack Brooks, (D-TX), and in the Senate (S 1488, S 1607) by Chairman Joseph R. Biden, Jr., (D-DE). These measures resembled significantly the bill that had stalled in the previous Congress. The Senate passed a $22 billion crime bill on November 19, 1993 by an overwhelming bipartisan vote of 95-4 containing, among other provisions, a novel funding mechanism, the "100,000 cops" Community Policing provision, prison construction funding, and prevention programs. This measure was incorporated into a smaller House bill that had passed (HR 3355) and became the building block for the omnibus bill ultimately passed in August of 1994.

85. 18 USC § 36 (1994) (federal offense to fire a weapon into a group of two or more persons).

86. 18 USC § 521 (1994) (increases federal penalties for certain federal crimes if defendant is a gang member).

87. 18 USC § 2119 (1994) (federal offense to take a motor vehicle from another by force).

88. Violent Crime Control and Law Enforcement Act of 1994, Pub L No 103-322, 108 Stat 1815, codified at 42 USC § 13701 et seq (1994).

89. 18 USC § 3591 et seq (1994). The fact that the exact number of death penalties provided in the Act is subject to debate evidences the duel by both sides to appear tough on crime. Even Members speaking on the Senate floor described the number of death penalties they were voting on as estimates. See 140 Cong Rec S 12298 (Aug 23, 1994)

and you're out" provision.[90] Enacted along with these provisions were millions of dollars in federal crime prevention grants.[91]

The enactment of comprehensive crime legislation is an example of a response to public hysteria over specific incidents of violent crime. The elements of the Crime Bill that were the product of the most vocal pleas to do something about crime were those responding to specific incidents fueling national fears of random violence.[92] A 1994 poll by the *Los Angeles Times* found that 32 percent of those polled said their fear of crime was heightened by specific incidents reported in the press.[93] Respondents cited the abduction of Polly Klaas from her home in California, the Long Island commuter train shooting, and the shooting deaths of tourists in Florida as among the incidents which have fueled their fears about crime.[94] However, legislative responses based on such fears actually provide the least workable solutions to the issues they claim to address. Rather than inspire public confidence in the Congress, these kinds of responses increase cynicism about the legislative process while offering few practical solutions.

B. SLOGAN SOLUTIONS: THREE STRIKES AND PENALTIES AS POLICY

Legislators whose ears are closely attuned to opinion polls will, in the end, give the people what they want, or at least what they express they want. The three-strikes provision is an example of a measure enacted by a legislature at pains to appear responsive to public fear about crime.[95] The measure, however, is little more than a good slogan. The enactment of this provision was accompanied by congressional fanfare touting the measure as a move by Congress to "do something" about violent crime.[96] The reality is that, as a crime-fighting tool,

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(statement of Senator Russell D. Feingold).

90. 18 USC § 3559(c) (1994).

91. Local Crime Prevention Block Grant Program, Pub L No 103-322, 108 Stat 1838 (1994), codified at 42 USC § 13751 (1994). Originally the funds earmarked for prevention programs in the bill were largely through categorical programs such as the notorious "Midnight Basketball" program. These programs quickly became the target of criticism as "pork barrel" projects and became a significant stumbling block to agreement by the conference committee. After a lengthy debate about the wisdom of categorical programs versus block grants directly to the states, a group of moderate Republican freshmen in the House forged a compromise on this and other issues blocking passage of the bill. See Harvey Berkman, *Crime Bill Critics Deride Spending*, Natl L J A12 (Aug 8, 1994).

92. Stephen Braun and Judy Pasternak, *A Nation with Peril on its Mind*, LA Times A1 (Feb 13, 1994).

93. Id.

94. Id.

95. Perhaps not coincidentally, the three-strikes sentencing provision began as a ballot initiative.

96. See 140 Cong Rec S12532 (Aug 25, 1994) (statement of Senator Max Baucus) ("I think the debate over the crime bill has shown why Americans are angry at politicians. The people are not interested in political maneuvering—they want their Government to do something about America's problems."). See also 140 Cong Rec S 12541 (Aug 25, 1994) (statement of Senator James R. Sasser) ("[I]t is time we stopped talking and acted on the American people's challenge to do something about crime.").

the three-strikes provision is largely redundant of state career criminal statutes.[97] In the long run, it may do nothing to lower already declining crime rates, and little to rehabilitate Congress in the minds of Americans.

Coming in response to a public perception that the criminal justice system does little to curtail the career criminal, the three-strikes provision mandates life imprisonment for offenders convicted of three violent crimes. Public sentiment was galvanized by the tragic story of Polly Klaas of Petaluma, California who was abducted from her home in the summer of 1993 by a convicted felon who had been released on parole.[98] The three-strikes provision, originally a voter initiative in California,[99] had the support of 85 percent of the American public in 1994.[100] Since 1993, approximately fourteen state legislatures have adopted three-strikes laws, while eighteen states already had "habitual offender" laws which increased the prison time for multiple felony offenders.[101]

This measure was immensely popular and passed the Senate by a wide margin[102] despite the fact that there was little evidence presented to Members as to how it might stem the violence that prompted its enactment.[103] Congress was responding to a perception that the Federal government must do something—anything—about violent crime.[104] The three-strikes measure, more than any other crime policy initiative in recent years, was enacted in response to an incident that galvanized media and public attention to random violence.

Despite its resonance with the voting public and the loud and repeated calls for three-strikes laws on a national scale, careful consideration of this as a crime fighting tool might have produced healthy skepticism as to its effectiveness on a national scale. For instance, under the federal law, those found guilty of a third "serious violent felony" will receive mandatory life imprisonment.[105] Paradoxically, violent local crimes, many of which are not covered by the three-strikes provision, are at the root of the public discomfort with levels of crime. The three-strikes provision may be ineffective because prosecutors may be less likely

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97. See, for example, Cal Penal Code § 17(b); Miss Ann Code Ann 99-19-81 (1996); R R S Neb 29-2221 (1996); Wash Rev Code Ann § 9.92.090 (West 1988).

98. See Richard C. Paddock and Jenifer Warren, *Fear, Anger, Calls for Action Are Legacy of Polly's Murder*, LA Times A3 (Dec 8, 1993).

99. Proposition 184, codified at Cal Penal Code § 1170.12 (West 1985 & Supp 1996).

100. Times Mirror Center, *The New Political Landscape* at 80 (cited in note 2).

101. Richard C. Reuben, *Get Tough Stance Draws Fiscal Criticism*, ABA J 16, 16 (Jan 1995).

102. The three-strikes provision was offered as an amendment to the Senate version of the Crime Bill. The amendment was offered by Senator Trent Lott, (R-MS), and passed 91 to 1. See 139 Cong Rec S 15258-62, 15269 (Nov 8, 1993).

103. During the 103d Congress' consideration of crime legislation, no hearings were held on the effectiveness of the three-strikes provision. In fact, Chairman Biden referred the omnibus crime bill to the full Senate without first holding hearings in Committee.

104. See Hanchette, *Crime As Top Issue*, Gannett News Service (cited in note 79).

105. Mandatory Life Imprisonment for Persons Convicted of Certain Felonies, § 70001(2)(F), Pub L No 103-322, 108 Stat 1982, codified at 18 USC § 3559. This section defines "serious violent felony." § 70001(H) defines a nonqualifying felony to include certain robberies and offenses not resulting in death or serious bodily harm.

to seek a third felony conviction out of fear that the jury will not convict in light of the harsh penalty.[106] Alternatively, however, prosecutors might use the threat of a stiffer penalty to gain more favorable plea bargaining agreements.[107]

In addition, had legislators deliberated more thoroughly, they would have been informed by past forms of mandatory minimum sentencing. The judiciary has expressed its disdain toward the mandatory minimum sentences enacted in the 1980s in response to public dissatisfaction with losing the "war on drugs."[108] Judges have argued that determinant sentencing ties their hands, and consequently, some judges refuse to adopt them.[109] Three-strikes may engender something akin to the episodes of judicial revolt that accompanied mandatory minimum sentencing.

Furthermore, three-strikes may not address its primary goal, recidivism. Experts on criminal recidivism argue that the most effective way to reduce violent crime is to incarcerate offenders during the most criminally active portion of their lives.[110] Many criminal justice policies have been based on the contention that a small percentage of the population commits a large percentage of the crimes. But this contention is falling into disrepute as people take a harder look at the research, facts, and fallacies surrounding recidivism.[111] A recent study by the Department of Justice indicates that locking up a small cadre of criminal offenders for life is a naive solution. The study notes that the number of people in the high crime producing bracket is not static, and fewer than 10 percent of high rate offenders had criminal careers of more than five years.[112]

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106. See generally Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal L Rev 1471 (1993).

107. Harvey Berkman, *Few Felons Out in Three Strikes*, Natl L J 3 (Feb 28, 1994), discussing Illinois' experience with the three strikes rule which it has had on the books since 1978. Berkman noted that the law appears not to have reduced crime rates because of its use as a bargaining chip by prosecutors.

108. Dick Goldberg, *Sentencing Nightmare: On the Bench, Opposition is Steadily Mounting to Determinate Rules*, LA Daily J 1, 5 (May 5, 1994).

109. See Richard Cohen, *Justice or Mandatory Revenge?* Wash Post A15 (July 13, 1993) (noting that United States District Judge Jack B. Weinstein has gained notoriety for his refusal to handle drug cases out of disgust with the way in which mandatory minimum sentences work to tie the hands of judges). See also Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 So Cal L Rev 357, 366 (1992); Jonathan Moses, *Many Judges, on Low Key Revolt, Go Around Sentencing Guidelines*, Wall St J B12 (May 7, 1993); and Gary Cohn, *More Judges Turning Against Mandatory Sentences*, Arizona Republic A1 (July 6, 1993).

110. See Peter W. Greenwood and Alan Abrahamse, *Selective Incapacitation* (Rand 1982) (discussing the concept of incapacitation and its relevance for recidivism).

111. See Marc Mauer, *Politics, Crime Control . . . and Baseball?*, 9 Criminal Justice 30, 32 (Fall 1994), correcting a misinterpretation of juvenile deliquency data reported in Marvin E. Wolfgang, et al, *Delinquency in a Birth Cohort* 287-318 (Chicago 1972). See also William Raspberry, *Crime and the 6% Solution*, Wash Post, A19 (March 19, 1994).

112. Department of Justice, *Comprehensive Strategies for Serious, Violent, and Chronic Juvenile Offenders* 27 (US Dept of Justice 1993).

Finally, three strikes is a very costly way to go about incarcerating those who might "age out" of their criminal careers quickly.[113] Three strikes does not address the crime problem at its core: why do offenders chose violence in the first place? A three-strikes or even two-strikes provision does nothing about the first strike.[114] The three strikes provision does little to address voter outrage at Congress or crime if it is a costly, underenforced, and ineffective law.

V. The Congressional Institution and Contemporary Models of Representation

The enactment of the crime bill and specifically the three-strikes measure illustrates how the national legislature is departing from the Framers' vision of a representative democracy and moving towards direct democracy. This begs the question of whether Members should vote according to aggregate constituent contacts or not? In addressing this question, scholars have put forth different models of representation. Their focus has been on representatives' loyalty to constituent preferences. Professor Hamilton has identified this as the "myth of self-rule."[115] Her critique charges that this view of the representative places too much emphasis on whether voices are being heard.[116] This Section builds on her criticism and challenges the notion that responsive democracy creates either good politics or good policy. It attempts to present legislators as both accountable and rational, and as capable of restoring substantive and deliberative decisionmaking to the process.

The focus in phone call democracy on responding to constituents inevitably takes away from the representative's role as a filter. Under the Madisonian conception of deliberative democracy representatives act as a buffer between popular passions and decisions that affect the national populus through a process of reasoned deliberation at a distance from the sources of the passionate factions. Given current cynicism about Congress and attempts to deal with that cynicism through phone call democracy, representation becomes redefined in terms of responsiveness. Defining representation in terms of responsiveness, as the preceding discussion of the Crime Bill demonstrates, empties the Madisonian conception of representation of any content. Departing from the Madisonian conception of representation should concern us, not just because this means governing counter to historical and constitutional design, but because the deliberative emphasis of the Madisonian view may help restore faith in the institution of Congress itself.

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113. Reuben, ABA J at 16 (cited in note 101).

114. A critic of the three strikes provision making this point notes that "two-thirds of persons charged with serious violent crimes in the nation's largest urban counties in 1990 had no prior felony convictions of any kind." See Mauer, 9 Criminal Justice at 33 (cited in note 105) (citing Bureau of Justice Statistics, *Counting Felony Defendants in Large Urban Counties*, 7 (1993)).

115. Hamilton, 69 NYU L Rev at 488 (cited in note 44).

116. Id.

Scholars have grappled with the question of whether representatives should be deliberative or responsive by offering different models of representation. The most compelling of those models for the current discussion are the attorneyship model of representation and the civic republican theory of representation. Absent from both of these theories of representation, however, is a focus on the institution, and its existing structure and organization.

A. The Attorneyship Model of Representation

Proponents of the attorneyship model of representation ground the representative's role in the model of the lawyer-client relationship. Under the attorneyship model, representatives maintain fealty to their constituents through two-way communication while simultaneously exercising their independent judgment in the client's or constituent's best interest.[117] This model retains the elements of the self-rule concept while at the same time, recognizing the representative's knowledge, expertise, and experience unique to that representative and his or her place in the legislative body.

The attorneyship model is closest to Founder James Wilson's notion of linking the legislator to the public.[118] The attorneyship model's emphasis on the exercise of independent judgment by the legislator is an important addition to the self-rule focus that pervades other theories of representation. Underlying the idea that the legislator remains accountable to the client or constituent is the Madisonian notion that "[a] dependence on the people is no doubt the primary controul on government."[119] By emphasizing communication between legislators and constituent/clients the attorneyship model maintains an essential feature of democracy—the transmission of information from the governed to the governing.

The attorneyship model advocates the occasional departure from the public will if, in the independent judgment of the legislator, the public interest is served by so doing. But while emphasizing independent judgment, the attorneyship model does not address the features of the Congress as an institution that can facilitate deliberative lawmaking.

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117. Hamilton, 69 NYY L Rev at 488 (cited in note 44), drawing on the work of David Luban, *Lawyers and Justice: An Ethical Study* (Princeton 1988). See also the discussion of John Stuart Mill's support for a trustee model of representation and contrasting it with delegation in Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy* 181 (Chicago 1995) ("A trustee has ampler room for maneuvering . . . . He can vote as he thinks best using his discretion, disregarding occasionally, if only temporarily, the opinion of his electors.").

118. See Geoffrey Seed, *James Wilson* 22-24 (KTO Press 1978).

119. Federalist 51 (Madison) reprinted in Garry Wills, ed, *The Federalist Papers* 261, 262 (Bantam 1982).

B. The Civic Republican Theory of Representation

Civic republicanism calls for more inclusion in the legislative process. It relies on two strands, emphasizing increased public participation in the lawmaking process and increased deliberation by Members.[120] Professors Sunstein and Michelman advance the deliberative function of government and increased participation in the legislative process as a way to achieve these ends.[121] These two strands of civic republicanism posit heightened direct participation and deliberation as political ideals.[122]

Professor Michelman posits that "the civic republican tradition is . . . participatory, conversational, inclusory, reasonable, and strongly committed to immediacy."[123] This strand of civic republican theory sounds like a rationale for phone call democracy. It privileges public participation, which is at the heart of the attractiveness of phone call democracy. It views this participation as taking the form of a conversation, and, perhaps most importantly, this strand of civic republican theory values immediacy, as might be achieved with phone calls to a representative's office.

But, participatory democracy does not always yield public-regarding legislation.[124] As the results of tallying phone calls in the passage of the Crime Bill reveals, it is difficult to see how directly increasing the participatory nature of the process yields public-regarding legislation. Still, it might be possible to restructure the participatory conduct so as to make it more constructive. For instance, focus groups are a way in which Members try to ascertain a cross section of views and understand what is of primary importance to constituents in order to set the legislative agenda. This might be a format by which constituents are ensured a voice in the process while at the same time guarding against the danger of hijacking the process in service to some anecdotal or incident-specific responsiveness. Merely increasing participation through sheer volume of contacts departs from the Madisonian notion of the representative as a filter for ideas from the states. Measures like three-strikes show that the current trend toward phone call democracy belies any such increase in deliberation and instead portrays a move toward less deliberation, almost removing the legislator from the process by casting her as little more than a phone call tallier.

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120. See Michelman, 100 Harv L Rev at 19 (cited in note 51) ("Republicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion, partly for the sake of nourishing civic virtue."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan L Rev 29, 57 (1985) ("[The] role of the representative is to deliberate on the public good, not to respond mechanically to existing social conceptions.").

121. Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L J 1539, 1539 (1988); Frank I. Michelman, *Law's Republic*, 97 Yale L J 1493, 1493-94 (1988).

122. Sunstein, 97 Yale L J at 1555 (cited in note 121).

123. Michelman, 100 Harv L Rev at 36 (cited in note 51).

124. I am using "public-regarding" as synonymous with Sunstein's notion of deliberating on the public good. See Sunstein, 97 Yale L J at 1545 (cited in note 121).

While the participatory strand of civic republican theory might embrace phone call democracy and the response to public fears it engenders as the product of a more participatory democracy, a second strand recognizes the importance of increased deliberation. Professor Sunstein cautions that "individual preferences should not be taken as exogenous to politics" but rather "[t]hey are a function of existing practice, including legal rules; such rules cannot, without circularity, be justified by reference to current preferences."[125]

The aspect of civic republicanism that emphasizes deliberation gets us closer to a recognition of constituent voices without subsuming the representative function. Increased deliberation in the process recaptures the republican notion envisioned by Madison. Increasing deliberation adds another important component to the conception of the representative and moves it away from a focus exclusively on self-rule. As Professor Sunstein notes, the "role of the representative is to deliberate on the public good, not to respond mechanically to existing social conceptions."[126] But achieving the deliberation on the public good is a challenge in a climate where constituents are distrustful of the institution and its Members.

Both the attorneyship model and the civic republican model of representation fail to offer the congressional institution itself as a locus for recovering deliberative democracy and restoring faith in the lawmaking process. The solution to the failures of phone call democracy lies in rehabilitating the role of the legislature itself. Both the civic republican and attorneyship models simply offer other ingredients to the mix, such as fealty to communication with constituents or a place for independent judgment. While both point to important weaknesses in the current process, neither looks for a solution in the institution.

The answer may not be in more direct participation but in more deliberation. Deliberation should come in the form of legislators reflecting on their role in the institution as filters of ideas, and gatherers of information to make reasoned decisions, rather than in the form of filibuster. Rather than look for solutions outside the Congress, the institution itself offers us the most hope of reversing the current cynicism and restoring the deliberative function of the representative.

C. Institutional Solutions

The influence of private wealth in campaigns and the importance of seniority in setting the Congressional agenda are the bases for distrust of Congress and the attendant desire for a more responsive Congress with Members who are closer to the citizens they represent.[127] The institution of Congress, although in need of reform, contains the basic structure and incentives for Members to make

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125. Id at 1549.

126. Sunstein, 38 Stan L Rev at 57 (cited in note 120).

127. For instance, the popularity of the term limits movement is chiefly based on a desire to instill a culture of amateur legislators in the Congress and get rid of careerist politicians who the movements' proponents believe are beholden to special interests.

decisions based on reasoned deliberation and to exercise their judgment in accord with their constituency if not in lock step with them.

The structure of the legislative body and the Members' role in it offer several reasons for optimism. First, Members need not rely on mere phone call tallies to make decisions consistent with the best interests of constituents. Second, the rules that govern the institution, while providing a way for phone call democracy to take root, also offer a way for people to make their voices heard in a more meaningful way. Information flow is essential to a well functioning democracy, and constituents may offer workable ideas rather than merely express knee-jerk reactions to issues. Third, Members are institutionally well-positioned to produce thoughtful solutions. The committee structure creates a unique system of incentives and opportunities for Members to be deliberative and responsive while remaining accountable to the voters who put them there.

1. Voter Sorting: Responding to the Elitism Charge

Any discussion of the representative nature of the legislative process opens itself up to charges of elitism. The Framers, who advocated insulation of representatives from the people, may rightly be accused of closing off the process. A perception that Members are out of step with constituent views on issues drives charges of elitism. At work here is the notion that insulation creates a paternalistic setting where a small group makes decisions for the many. This conception assumes that the Members sent to Washington do not hold views consistent with those who elected them. However, scholars who have studied voter sorting—the process by which voters determine which candidate to send to Washington—show that the capacities of a member to listen to constituents and make judgments are not mutually exclusive.[128] Voter sorting of elected officials occurs when voters put Members in office who actually mirror the voters' views.[129] While it seems logical that voters would only vote for those who hold views consistent with their own, dissatisfaction with the process—from campaign finance to the day-to-day workings or inertia of Congress—indicate no such correlation.[130] But, studies of voter sorting indicate that Members exercise independent judgment not at odds with voter preferences.[131] If such sorting does go on ex ante, there may be less reason to be concerned with reserving the right to instruct Members later. For instance, Members who announce their retirement do not appreciably alter their voting behavior for the remainder of their term from the voting behavior of non-retirees.[132] The idea here is that

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128. See John R. Lott, Jr., and Michael L. Davis, *A Critical Review and Extension of the Political Shirking Literature*, 74 Public Choice 461, 478 (1992).

129. Id.

130. Times Mirror Center, *The New Political Landscape* at 23 (cited in note 2).

131. Bruce Bender and John R. Lott, Jr., *Legislative Voting and Shirking: A Critical Review of the Literature*, 87 Public Choice 67 (1996); John R. Lott, Jr., *Attendance Rates, Political Shirking, and the Effect of Post-Elective Office Employment*, 28 Econ Inquiry 133 (1990).

132. Lott, 28 Econ Inquiry at 133 (cited in note 131) and John R. Lott, Jr., and

once a representative is not faced with the prospect of reelection and of pleasing interest groups, she is far more likely to show her true colors. The fact that a change in voting behavior does not occur challenges the notion that legislators are beholden to special interests and are out of step with constituents. This finding supports the view that the political market has already sorted out Members not in sync with the majority of constituent views, and weakens the elitism charge that Members are too insulated from constituent pressures.

Of course, this points to an apparent disjuncture between Members' actual preferences and how voters perceive them and does not take away from the need to communicate views to representatives. However, the data on sorting indicates that the concerns about an out of touch Congress may be overstated. The voter sorting data indicates that the concern about a hyper-responsive Congress is consistent with the literature revealing that Congress Members largely mirror the views of the citizens that put them there. Then why is phone call democracy such a concern—if Members are merely doing what voters sent them there to do? The answer is that voters and Members share the same concerns as to issues that should be prioritized and solved by Members but when it comes to legislating, phone call democracy results in anecdotal legislation in response to specific incidents which have gained public notoriety. This, in turn, leads to ill-conceived policy responses like the three-strikes provision.

2. Procedural Rules

If increased deliberation is the goal, how, given the rules that govern the institution, can we hope to achieve it? For instance, the Senate's rules of seniority that govern the committee structure place virtually all the agenda-setting power in the hands of the majority party and the relevant committee chairs.[133] Critics say this precludes open debate.[134] However, the Senate's requirement that all business be conduced by unanimous consent, as well as its filibuster option, create numerous blocking possibilities for any minority party member or any one Senator who wants to defeat a measure. Likewise, the ability of any Senator to offer any amendment at any time (with some restrictions regarding budget legislation) makes it certain that a member may bring virtually any measure to a vote—albeit eventually. These rules are the same ones that prompt charges of gridlock.

However, the rules that govern the process and the manner in which business is conducted ensure that minority Members of the body have their views heard. Because each Member has some power to wield, and a vote to bargain with,

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Stephen G. Bronars, *Time Series Evidence on Shirking in the U.S. House of Representatives*, 76 Pub Choice 125, 128-33 (1995) (finding that Members do not alter their behavior in their last term before leaving or seeking higher office).

133. *Standing Rules of the U.S. Senate*, Rule XXVI § 3(b)(1) (GPO 1977).

134. See Gerald B.H. Solomon, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 Harv J Leg 321, 321 (1994) (discussing how the House rules limit debate by the minority party).

each can ensure that her voice is heard and perhaps that her ideas be incorporated. At any rate, deliberation is a natural product of the procedural rules.

3. Committees

The committee structure, while in need of some reform, is the primary reason to have faith in the deliberative nature of the process. Committees are structured to provide accountability. They allow for study, hearings, and written reports. The activities of the committees suggest that Members do not use the committee system to avoid opportunities to go on record in order to preserve political capital.[135] Committee chairs welcome the opportunity to be heard and to create fora for their constituents to testify. Because of the unique control that committee chairs have over the design and content of hearings—including who testifies and on what—testimony at hearings may be viewed as simply an additional forum for interest group influence in the form of witnesses. It is up to the chair to decide the extent to which individuals will be heard by the committee or to which their written views will be placed in the committee record. A way to ensure more participation might be to allow individual views to appear in the committee's written record and report to a greater extent. This already occurs in the context of confirmation hearings for judicial nominees where individuals who have had personal experience with the nominee will generally be allowed to testify or to sumbit statements for the record.[136] This of course raises efficiency concerns regarding investigative resources to verify statements made by individuals about a particular nominee.

At the root of the average committee Member's desire to be credible and to use her seat on committee as a forum for constituents is of course the desire to be responsive to constituent concerns. When responsiveness is exercised in this way, within the structure of the committee's investigative process, and with checks on the agenda-setting power, such a forum is bound to have a positive impact.

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135. During the 103d Congress alone, the Majority Staff of the Senate Committee on the Judiciary issued a number of reports studying different aspects of the crime problem and proffering proposals. See, for example, Senate Judiciary Committee, Senator Joseph R. Biden, Jr., Chairman, *America's Drug Strategy: Rejecting Retreat, Moving Forward* (1994) and Majority Staff of the Senate Judiciary Committee, *Catalogue of Hope: Crime Prevention Programs for At-Risk Children* (April 1994). While it would be a mistake to ignore the overtly political nature of these reports, the fact remains that they serve the purpose of putting issues and policy solutions in the public forum for discussion and deliberation where Members must go on record with their views. This might be the real two-way communication feature of the attorneyship model. See Hamilton, 69 NYU L Rev at 541-42 (cited in note 44).

136. For recent examples, see *The Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court*, Hearing before the Committee on the Judiciary of the United States Senate, 103d Cong, 2d Sess (July 12, 13, 14 and 15, 1994), and; *The Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court*, Hearing before the Committee on the Judiciary of the United States Senate, 103d Cong., 1st Sess (July 20, 21, 22 and 23, 1993) (see statements on behalf of the nominee by members of the Bar, legal academia, and former litigants).

At the center of phone call democracy's appeal is the ability of citizens to be heard almost immediately. Scholars of legal proceedings have suggested that simply being heard increases the participant's views of the legitimacy of a proceeding concluding that people are more likely to be content with an outcome—even if it is adverse to them—when they feel they have had their say in the process.[137] This is useful information in contemplating reform of the committee process. A reinvigorated committee structure could provide more meaningful participation than in phone call democracy.

Improvements in the committee investigatory and agenda-setting process might include expanding minority witness participation. In general, the committee chair retains power to set the agenda and format of any hearings and determine all witnesses in consultation with the ranking member of the minority party on the committee. Consequently, witnesses reflecting minority viewpoints are often heard from last and end up speaking to few Members and empty hearing rooms. Allowing greater and more meaningful participation by witnesses with minority viewpoints—whether or not these witnesses are gathered by the minority party—through a hearing format in which these views are presented to the members of the committee with equal prominence, would improve the information gathering task of committees. Such presentation would guarantee a degree of balance in the proceedings in a public way. In addition, there might be a more formal process for registering views outside those of the largest interest group or executive agency.

Alternatively, a requirement of impact statements of affected constituencies similar to the cost-benefit and environmental impact statements currently required to accompany all legislation would ensure that the views of traditionally underserved and underrepresented groups are included in the debate. Much of the criticism of the committee process is that organized groups with established contacts and clout are the ones who are heard in the committee process. A formal requirement that minority views be included in the record could remove some discretion of the chair and ranking member, who have historically been the ones who decide when, if, and to what extent minority views are included in the process.

Expanding the process by which minority views are included is only as effective as the extent to which they are disseminated, and the extent to which the public perceives them as considered by Members. The advent of CSPAN and CSPAN II have dramatically altered the perception of how the country is governed. The practice of "special orders" or delivering statements to an empty chamber for the benefit of the television audience creates the illusion that the members are actually engaged in discussion and debate on issues.[138] Similarly in the Senate, cameras televise proceedings such as the procedural quorum calls—the practice of calling the roll while informal side discussions continue in

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137. See Tom R. Tyler, *Why People Obey the Law* 170-78 (Yale 1990).

138. This perception is in fact minimized when cameras periodically pan empty seats in the chamber.

an effort to reach consensus on a bill and bring it to a vote. These discussions often take place outside the view of the stationary camera which only focuses on the speakers at the podium.[139]

In the committee context, television has enabled constituents to become more familiar with their representatives through broadcast of high profile proceedings such as Supreme Court confirmation hearings or hearings on health care reform. In addition, seemingly more mundane proceedings, such as those on civil justice reform, tend to be covered when conducted by committees that have garnered an audience through the televising of other proceedings. Committees gain an audience to a certain degree through the televising of more high profile proceedings which may in turn provide an incentive for Members to participate as credible policy makers when engaged on other issues.

The familiar criticism of the committee structure and the seniority system by which it operates is that it entrenches Members.[140] This may explain the popularity of reform measures such as term limits. However, before embracing term limits and other means of preventing the entrenchment of certain Members, it is important to think about the consequences of such a move and the advantages of the current system.[141] With televised committe proceedings, the committee process is a valuable way for Members to be repeat players and develop reputations as legislative experts among their constituencies as well as nationally.

The current system of seniority also enables the institution, constituents, and courts to distribute and assign power and expertise among Members. The chair of a committee who has spent years and assembled an experienced staff can establish a record on welfare policy which may be used or referred to when interpreting a statute related to welfare policy. In contrast, a junior member on that same committee may have relatively little experience in a the policy area and therefore may be of less weight when interpreting legislation. This mode of ordering can enhance the ability of Members to make rational, deliberative decisions.[142] Because of the seniority system, Members of the institution have every interest in maintaining credibility on issues on which they will be long term players and develop expertise and specialization among issues.[143]

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139. See "C-Span's Shackles," LA Times 6 (Jan 5, 1995) (describing C-Span's unsucessful effort to be allowed to use a roving camera).

140. See, for example, Barry R. Weingast and William J. Marshall, *The Institutional Organization of Congress, or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J Pol Econ 132, 143 (1988).

141. See generally Elizabeth Garrett, *Term Limitations and the Myth of the Citizen Legislator*, 81 Cornell L Rev 623 (1996) (critiquing the argument of term limit proponents that term limits will produce "citizen legislators").

142. Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum L Rev 2121, 2197 (1990) (noting that "[a]genda-setting powers . . . can be used . . . fairly, legitimately, wisely[,] or rationally").

143. The case of term limits raises another reason to be suspicious about measures that receive vocal support in public opinion polls. Term limits is widely regarded as a popular idea, but it too has unanticipated consequences of reducing incentives for Members to be

In a system where constituents funnel concerns through committee proceedings, and where constituents may give more weight to statements by committee chairs and Members with an established record in a particular field, the committee structure can produce reasoned policy decisions. This structure creates an accountable outlet for information and forum for investigation of issues. Critics charge that the structure of committees creates a place for interest groups to target Members and concentrate efforts to produce committee report language (if not actual legislation) reflecting their interests.[144] Committees, however, also are the place where Members acquire expertise on issues and gain credibility with their constituents, creating a forum where they have an interest in becoming and remaining an authority on issues. Thus, the same place that allows Members to wield the most power and take advantage of the congressional seniority rules, creates a forum for evaluation. In this sense, Members are inherently well-positioned, and furnished with the right set of incentives, to be good decision makers.

Conclusion

When features of direct democracy make their way into the national legislative process, with all the attendant problems of measures enacted in response to clashing interests, Madison's fear of the power concentrated in one branch begins to look less and less remote. Madison called government, "the greatest of all reflections on human nature."[145] In keeping with this vision he noted that, in addition to dependence on the people, those who govern must maintain, "by opposite and rival interests," internal controls on government.[146] "The interest of man must be connected with the constitutional rights of the place."[147]

While it would be a mistake to look at this commentary in a vacuum, if we take the "constitutional rights" of the place to mean the deliberative responsibility of the institution, such a reading demands that representatives not feed cynical politics by responding to every constituent tremor. Likewise, Madison's reference to "interests" is susceptible to many interpretations. One might read "interests"

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credible proponents or to gain any kind of policy expertise. Proponents of term limits argue that such reforms would decrease the influence of lobbyists. There is an argument to be made for the contrary in that lobbyists are not the outgrowth of powerful Members of Congress but instead are themselves a cottage industry who are likely to have more to offer in expertise and influence to perpetual freshman Members of both Houses than to those who are themselves well versed in various issues. See Garrett, 81 Cornell L Rev at 682 (cited in note 141). See also Weingast and Marshall, *The Institutional Organization of Congress*, 96 J Pol Econ at 143 (cited in note 140) (discussing why seniority increases stability in committees and legislative work).

144. See generally Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction*, (Chicago 1991).

145. Federalist 51 (Madison) at 262 (cited in note 115).

146. Id at 263.

147. Id at 262.

as allegiance.[148] Such a reading would demand that representatives identify with the institution and not run from it in response to constituent whims.

Phone call democracy runs headlong into what Madison warned against: the danger of a super legislature swayed by vocal elements. The danger is that in being so directly responsive, representatives shed the deliberative process and foster cynicism about government. In the process, Members and citizens lose sight of Congress' potential to be a beneficial actor in society, and make it, instead, merely a vessel of "popular" will.

148. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 Tex L Rev 447, 479 (1996).